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No. 02-

IN THE
Supreme Court of the United States

DANIEL E. MORGAN. SERGEANT FIRST CLASS,
UNITED STATES ARMY,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Armed Forces

PETITION FOR WRIT OF CERTIORARI

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46 pp

QUESTION PRESENTED

Whether the Court of Appeals for the Armed Forces blatantly disregarded the plain and unambiguous meaning of Congress' mandate in 10 U.S.C. § 825(c) (1), and its own *stare decisis*, which explicitly preclude enlisted service members from serving on courts-martial unless defendants "personally" request, orally or in writing, that they want to be tried by a jury consisting of enlisted service members.

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IN THE

Supreme Court of the United States

DANIEL E. MORGAN, SERGEANT FIRST CLASS,
UNITED STATES ARMY,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

PETITION FOR WRIT OF CERTIORARI

The petitioner, Daniel E. Morgan, respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Armed Forces in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Armed Forces is reported at 57 M.J. 119 (C.A.A.F. 2002) (Appendix A). The decision of the United States Army Court of Criminal Appeals is unpublished (Appendix B).

JURISDICTION

The judgment for the Court of Appeals for the Armed Forces was entered on August 1, 2002 (Appendix A). The jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1259 (3), the United States Court of Appeals for the Armed Forces having reviewed this case pursuant to Uniform Code of Military Justice Article 67(a)(3), 10 U.S.C. § 867(a)(3).

STATUTORY PROVISION INVOLVED

This case involves Article 25(c) (1) of the Uniform Code of Military Justice, 10 U.S.C. § 825, which provides:

> Any enlisted member of an armed force on active duty who is not a member of the same unit as the accused is eligible to serve on general and special courts-martial for the trial of any enlisted member of an armed force who may lawfully be brought before such courts for trial, but he shall serve as a member of a court only if, before the conclusion of a session called by the military judge under section 839(a) of this title (article 39(a)) prior to trial or, in the absence of such a session, before the court is assembled for the trial of the accused, the accused personally has requested orally on the record or in writing that enlisted members serve on it. After such a request, the accused may not be tried by a general or special court-martial the membership of which does not include enlisted members in a number comprising at least one-third of the total membership of the court, unless eligible enlisted members cannot be obtained on account of physical conditions or military exigencies. If such members cannot be obtained, the court may be assembled and the trial held without them, but the convening authority shall make a detailed written statement, to be appended to the record, stating why they could not be obtained.

STATEMENT OF THE CASE

Over a period of four days in 1996, notwithstanding clear Congressional mandate to the contrary, a court-martial with enlisted service members convened to try a military defendant even when the defendant had not personally requested, orally or in writing, that he be tried by a court-martial consisting of enlisted service members.

Procedural History

On November 4-7, 1996, a court-martial panel with enlisted service members tried and found Sergeant First Class Daniel E. Morgan [hereinafter petitioner] guilty of the wrongful importation of marijuana, in violation of Article 112a of the Uniform Code of Military Justice [hereinafter U.C.M.J.], 10 U.S.C. § 912a. The court-martial sentenced the petitioner to a dishonorable discharge, six years confinement, forfeiture of $437.00 pay per month for six years, and reduction to the grade of Private E-1. This sentence was approved.

Subsequent to the initial filing by both parties, the United States Army Court of Criminal Appeals specified two issues on September 3, 1998, concerning the adequacy of the record with respect to the petitioner's personal election of forum and potential jurisdictional impact. After receiving briefs and hearing oral arguments, the Army Court of Criminal Appeals ordered on January 15, 1999, that a military judge conduct a fact-finding hearing[1] to make specific findings of fact concerning petitioner's election of forum at his court-martial. The military judge at the fact-finding hearing found that the petitioner did make an informed personal choice to be tried by a panel consisting of officer and enlisted members. On May 14, 2001, despite finding error, the Army Court of Criminal Appeals affirmed the findings of guilty and the sentence (Appendix B).

On November 5, 2001, the United States Court of Appeals for the Armed Forces granted review on the following issue:

> Whether the Record of Trial Fails to Show That Appellant Made a Personal Election of Forum in this Case Thus Creating a Jurisdictional Error Requiring Reversal.

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[1] Pursuant to *United States v. DuBay*, 17 U.S.C.M.A. 147, 34 C.M.R. 411 (C.M.A. 1967).

The Court of Appeals for the Armed Forces rendered its opinion on August 1, 2002, affirming the decision of the Army Court of Criminal Appeals (Appendix A). The majority held that there were many opportunities during trial for the petitioner, an older and more experienced soldier, to object to being tried by enlisted service members, but none were made. Therefore, while the military judge erred by not obtaining the petitioner's personal request for trial with enlisted members either orally or in writing, the court found that the error was procedural, rather than jurisdictional. Judge Effron dissented, detailing the legislative and case history of Article 25(c) (1), and noting Congress' steadfast adherence to the requirement of a "personal" election of forum from the defendant. As enlisted service members served in petitioner's court-martial without having been personally requested by him orally or in writing, Judge Effron therefore found that the majority's opinion upholding the validity of the petitioner's court-martial to be contrary to the clear statutory requirement prescribed by Congress and the court's own precedent.

Statement of Facts

Petitioner made no personal election, either written or oral, for a trial with enlisted members.

Petitioner was tried by a panel with enlisted members.

At the Army Court of Criminal Appeals' direction, a fact-finding hearing was held almost two and one half years after the trial was completed. The same military judge that presided over the original trial also presided over the fact-finding hearing. During the hearing, the military judge introduced and attached to the record a standard Notice of Plea and of Forum from his (the military judge's) files, a document that was signed only by the petitioner's military attorney and faxed to the military judge almost two weeks before the original trial began. This document notified the military judge that the defense "*will* enter a plea of not guilty to all charges and

specifications in the case of *US v. Morgan*" and that the defense "*will* request trial before a court-martial panel consisting of at least one-third enlisted members." (emphasis added). The petitioner did not sign this document, nor did the petitioner follow up on this initial notification by a personal election, either written or oral.

REASONS FOR GRANTING THE WRIT

Article 25(c) (1) is clear and unambiguous. The Court of Appeals for the Armed Forces blatantly disregarded the plain meaning of the statute by upholding the validity of petitioner's court-martial even without a personal election of forum. It further disregarded the principle of *stare decisis* and rendered a decision contrary to its own case precedent, in the process making heretofore clear statutory language meaningless and varied.

Plain Meaning of Article 25(c)(1)

In *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002), this Court stated that "in all statutory construction cases, we begin with the language of the statute. The first step 'is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case.' (citations omitted). The inquiry ceases 'if the statutory language is unambiguous and the statutory scheme is coherent and consistent.'" (citation omitted). This Court further emphasized that "[w]e have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" *Id.* (citation omitted).

Article 25(c) (1) states that an enlisted member may serve on a court-martial only if one of two conditions occurs before the court is assembled: (1) the defendant personally has

requested orally on the record for enlisted members to serve; or (2) the defendant personally has requested in writing for enlisted members to serve. Webster's dictionary defines "personal" as "done in person *without the intervention of another*: direct from one person to another; also: originating in or proceeding from a single person." Webster's Third New International Dictionary 1686 (3d ed. 1961) (emphasis added). As clear as the statute itself and the definition of "personal" are, neither of the two conditions Congress mandated occurred in this case. The petitioner did not personally request orally or in writing a trial with enlisted members. As such, his court-martial is invalid as it lacked the jurisdiction to try him.

Stare Decisis

Prior to *United States v. Townes*, 52 M.J. 275 (C.A.A.F. 2000), the Court of Appeals for the Armed Forces had consistently accorded Article 25(c) (1) a plain and unambiguous meaning and had consistently ruled that failure to comply with Article 25's strict requirements would render a court-martial without jurisdiction to try the defendant. In *United States v. White*, 21 U.S.C.M.A. 583, 588, 45 C.M.R. 357, 362 (C.M.A. 1972), the Court of Military Appeals[2] correctly deferred to congressional intent and held that:

> [A] convening authority is without power to designate enlisted members to sit, absent the personal written request of the accused. Not even the accused's counsel may act for him. Manifestly, Congress intended that the accused's personal written request be an indispensable prerequisite to an enlisted man's membership on a particular court. No other interpretation of the clear statutory language is reasonable.

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[2] The Court of Appeals for the Armed Forces was previously known as the Court of Military Appeals.

At the time of the *White* decision, Congress had not amended Article 25(c)(1) to permit oral requests for trial with enlisted members.

In *Gallagher v. United States*, 22 U.S.C.M.A. 191, 46 C.M.R. 191 (C.M.A. 1973), the Court of Military Appeals similarly held that the defendant's court-martial lacked the jurisdiction to try him because of the absence of a written request for trial with enlisted members personally signed by the defendant.

In *United States v. Landrum*, 3 M.J. 160 (C.M.A. 1977), the Court of Military Appeals once again held that the defendant's court-martial lacked the jurisdiction to try him since the written request for trial with enlisted members was unsigned.

In *United States v. Brandt*, 20 M.J. 74 (C.M.A. 1985), the Court of Military Appeals affirmed its prior decisions and held that defendant's court-martial lacked the jurisdiction to try him since the written request for trial with enlisted members was signed by counsel only. The court noted that Congress had amended a similar provision in Article 16 of the U.C.M.J. to allow for an oral request on the record for a judge alone trial. *Id.* at 77. "We can only assume that, if Congress wished to relax the requirement in this Article, it would have taken appropriate action to do so at the same time that it relaxed the parallel requirement in Article 16." *Id.* Congress subsequently amended Article 25(c) (1) to permit the accused to make an oral request at trial for enlisted members. *See* National Defense Authorization Act for Fiscal Year 1987, Pub.L. No. 99-661, § 803(a), 100 Stat. 3816, 3906. The requirement that the request be "personal" was never changed.

Besides according statutes their clear and unambiguous meaning, this Court has consistently emphasized the importance of *stare decisis* in statutory interpretation. In *Neal v. United States*, 516 U.S. 284, 295-96 (1996), this Court

reasoned that the judiciary should "give great weight to stare decisis in the area of statutory construction" because "Congress, not this Court, has the responsibility for revising its statutes." *See also Hilton v. South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991) ("Adherence to precedent promotes stability, predictability, and respect for judicial authority.") (citation omitted).

In *United States v. Townes*, 52 M.J. 275, 277 (C.A.A.F. 2000), *cert. denied, Townes v. United States*, 531 U.S. 821 (2000), the Court of Appeals for the Armed Forces disregarded the principle of *stare decisis* and began the process of eroding Article 25(c) (1)'s clear mandate. The court unanimously held that an oral request by defense counsel for an enlisted panel would comply with the requirements prescribed by Congress in Article 25(c) (1). In *Townes*, Townes' defense counsel informed the military judge, in open court and in Townes' presence, that "at this time we make a formal election for officer and enlisted members." 52 M.J. at 276.

In this case, Article 25(c) (1) and clear congressional intent have essentially been dealt a death blow and rendered meaningless by the Court of Appeals for the Armed Forces' majority opinion. Even in the absence of a personal request, written or oral, from the petitioner for trial with enlisted members, the majority came to the conclusion that Article 25(c)(1)'s jurisdictional prerequisite has been met. This case is yet another step removed from *Townes* as there was also no election presented in open session by either of the petitioner's attorneys on his behalf. Adopting what is essentially a "totality of the circumstances" doctrine, the court came to the conclusion that the failure to obtain the defendant's personal election of forum in this case is only a procedural error, not a jurisdictional defect. *Morgan*, 57 M.J. at 122. The court took into consideration a myriad of factors to include the following: petitioner was 47 years old and had the rank of a sergeant first class at the time of trial, had received 14 years of education,

had more than 20 years of military service, had been informed of his forum choices and did not object to the fact that he was being tried by a panel with enlisted members. *Id.* at 120-122. The court further relied on a standard pretrial document entitled "Notice of Plea and of Forum" indicating a possible future request, signed solely by defense counsel as an adequate substitute for the Congressional mandate that the accused "personally" request "orally on the record or in writing" that enlisted members serve on the court-martial panel. This logic is flawed.

Besides flying in the face of plain and unambiguous statutory language to the contrary, this totality of the circumstances approach also creates uncertainty in an area that was previously clear based on the court's precedent, precisely the reason this Court has cautioned the judiciary to heed to the principle of *stare decisis*. If Article 25(c) (1) has been complied with in this case because of the various factors mentioned above, what about future cases with different defendants from different backgrounds? Will there also be substantial compliance if the defendant is 30 years old as opposed to 47 years old? 0-5 years of education as opposed to 14 years? Rank of a private with a few months of service as opposed to a sergeant first class with over 20 years of service? What factor should weigh more? What factor should weigh less? As Justice Souter stated while a justice on the New Hampshire Supreme Court, the obligation of the judiciary "is to construe the statute, not to render its language meaninglessly protean. Once the statute has been construed, *stare decisis* calls for a reasonable degree of certainty in applying that construction to future cases, subject always to the legislature's power to modify the statute itself." *In re Correia*, 519 A.2d 263, 266 (N.H. 1986). By adopting this amorphous balancing test, the Court of Appeals for the Armed Forces has rendered what was previously plain and unambiguous statutory language "meaninglessly protean," subject to endless litigation.

Moreover, in its efforts to save an otherwise sinking record, the Court of Appeals for the Armed Forces relied heavily on a pretrial document entitled Notice of Plea and of Forum, which was provided to the military judge by petitioner's military defense counsel before trial as an initial notification. However, the court essentially used this document as a present tense, binding, affirmative election of forum by the defendant. A "notice" does not bind a defendant at trial. On the contrary, "notice" of intended plea and forum frequently change before trial.

Furthermore, as Judge Effron pointed out in his dissent:

> A jurisdictional deficiency cannot be corrected through a post-trial reconstruction of events in a *DuBay* (fact-finding) hearing. *See United States v. Irvin*, 21 M.J. 184, 187 (CMA 1986). A post-trial attempt to reconstruct conversations between counsel and client is no substitute for the statutory requirement of a request on the record. Likewise, the record cannot be cured through reliance on a unilateral pretrial fax from defense counsel describing what his client "will request" – a document which on its fact describes only a possible future action, not a present request.

Townes, 57 M.J. at 126.

Article 25(c) (1) is a clear requirement. It is not subject to each party's independent recollection years after trial, nor is it subject to each defendant's particular background. If silent acquiescence can equal compliance with Article 25, the government would henceforth be relieved of any obligation to obtain a defendant's personal election of forum. Congress has the opportunity to amend Article 25, and has in fact done so to permit personal oral requests for trial with enlisted members. Congress, however, continues to require that the "personal" election be from the defendant.

CONCLUSION

WHEREFORE, petitioner respectfully requests that this Court set aside the findings of guilty and the sentence due to lack of jurisdiction.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES,
Appellee

v.

Daniel E. Morgan,
Sergeant First Class U.S. Army,
Appellant

NO. 01-0663
CRIM. APP. NO. 9601890

United States Court of Appeals for the Armed Forces

Argued February 6, 2002
Decided August 1, 2002

CRAWFORD, C.J., delivered the opinion of the Court, in which GIERKE and BAKER, JJ., joined. SULLIVAN, S.J., filed an opinion dissenting in part and concurring in the result. EFFRON, J., filed a dissenting opinion.

Chief Judge CRAWFORD delivered the opinion of the Court.

Contrary to his pleas, appellant was convicted of possession of marijuana with intent to distribute and importation of marijuana into the customs territory of the United States, in violation of Article 112a, Uniform Code of Military Justice (UCMJ), 10 USC § 912a. A panel of officer and enlisted members, sitting as a general court-martial, sentenced him to a dishonorable discharge, confinement for six years, forfeiture of $437.00 pay per month for six years, and reduction to the grade of E-1. The convening authority approved the sentence as adjudged and gave appellant 92 days of confinement credit.

Before the Army Court of Criminal Appeals, appellant contended that the record of trial did not show that he made a personal selection for enlisted personnel to sit on the court, as required by Article 25(c)(1), UCMJ, 10 USC § 825(c)(1).[1] The Court of Criminal Appeals ordered a limited hearing pursuant to *United States v. DuBay*, 17 USCMA 147, 37 CMR 411 (1967), to find facts pertinent to appellant's election of a forum at his court-martial. Following this hearing, the Court of Criminal Appeals affirmed the findings of guilty and sentence in an unpublished opinion.

We granted review of the following issue:

WHETHER THE RECORD OF TRIAL FAILS TO SHOW THAT APPELLANT MADE A PERSONAL ELECTION OF FORUM IN THIS CASE, THUS CREATING A JURISDICTIONAL ERROR REQUIRING REVERSAL.

We hold that the military judge erred by not obtaining on the record appellant's personal request for enlisted members, but that there was substantial compliance with Article 25. We further hold that the error was not jurisdictional, and under the circumstances, it did not materially prejudice the substantial rights of appellant. Art. 59(a), UCMJ, 10 USC § 859(a).

FACTS

Appellant's trial was held on October 3 and November 4-7, 1996, and a *DuBay* hearing was held on April 26-27, 1999.

---

[1] Article 25(c)(1) states that enlisted members may serve on a court-martial "only if, before the conclusion of a session called by the military judge under section 839(a) of this title (article 39(a)) prior to trial or, in the absence of such a session, before the court is assembled for the trial of the accused, the accused personally has requested orally on the record or in writing that enlisted members serve on it."

During his arraignment hearing on October 3, 1996, appellant, a 47-year-old soldier with 14 years of education, a GT score of 125, and more than 20 years of service, acknowledged that he understood, *inter alia*, that at his request, at least one-third of the members of his general court-martial could be enlisted persons, and all would be senior to him. When asked if he was prepared to notify the court of his forum selection, appellant's civilian defense counsel informed the judge that they were not so prepared. The hearing session concluded with the setting of a trial date. Civilian defense counsel clearly informed the military judge that "there is going to be a panel." The military judge set a deadline of October 21, 1996, for appellant to make his forum selection. On October 21, the military judge received the following fax from the military defense counsel:

COURTS-MARTIAL
IN THE MATTER OF

UNITED STATES

V.

SFC DANIEL MORGAN

NOTICE OF PLEA AND OF FORUM
21 Oct 1996

The defense hereby gives notice of the following in accordance with the Military Judge's instructions:

a. The defense will enter a plea of not guilty to all charges and specifications in the case of *U.S. v. Morgan*.

b. The defense will request trial before a court-martial panel consisting of at least one third enlisted members.

The defense will promptly notify should these choices change prior to trial.

AMY L. ROOSE
CPT, JA
Defense Counsel

When appellant's court-martial reconvened on November 4, and after the disposition of several motions, the court-martial members entered the courtroom. Each was introduced by name and rank. Appellant and his counsel had copies of the convening orders detailing enlisted members to the court. At no time from November 4 through November 7 -- *voir dire* through sentencing -- did appellant ever object to the presence of enlisted members.

At the *DuBay* hearing conducted on April 26-27, 1999, appellant remembered being advised of his counsel rights and telling the military judge that he wanted his detailed military counsel, Captain Roose, and civilian counsel, Mr. James L. Willson, to represent him. He also remembered being advised of various rights he had as to a forum and reaffirmed that he understood those rights included the right to trial by enlisted members. He knew that if he elected enlisted members, at least one-third of the panel would be enlisted members, and they could not come from his company or battery. He remembered the military judge giving the members preliminary instructions, and seeing the grade/rank of each court member who was selected to judge his guilt or innocence.

Appellant affirmed that he understood it was *his* choice, not his attorney's choice, as to which forum (military judge

alone; all officer members; or officers and at least one-third enlisted) would try him.

When appellant was asked by the military judge whether he remembered talking to his trial defense counsel about the forum selection, defense counsel representing appellant at the *DuBay* hearing interposed his first of several objections to the judge's invasion of the attorney/client privilege. Later in the hearing, the military judge asked appellant whether, after seeing the court members present, he at any time told his counsel, "Hey, I don't want this jury." Again, defense counsel advised appellant not to answer the question on the basis of attorney/client privilege. After repeated questioning by the military judge concerning what advice appellant understood and what elections he had made, defense counsel for the *DuBay* hearing summed up his position as follows:

> [T]he record clearly indicates that the panel is just brought in. So the accused was never asked by the court a month later, on the date when his trial began and the impaneling process was undertaken, what the choices were at that point in time.

Ms. Amy L. Roose, formerly Captain Roose and appellant's defense counsel at trial, was called as a witness. After unsuccessfully raising the attorney/client privilege and asking for a recess to contact her state bar, the military judge ordered her to testify. Ms. Roose then confirmed that the fax she sent to the military judge on October 21 "reflect[ed] what [her] client's wishes were," *i.e.*, "the client was advised and ... he chose to go with the enlisted panel." Finally, Ms. Roose testified that if appellant had changed his mind about requesting a one-third enlisted forum subsequent to her October 21 fax, she would have so advised the court. However, that did not happen.

Mr. Willson, civilian counsel at the original trial, was also called as a witness. Mr. Willson agreed that while counsel recommend an appropriate forum, it is ultimately the client's choice and decision. He remembered questioning the members and exercising challenges. After a defense objection and discussion of Mr. Willson's ethical responsibilities under the Oklahoma Bar Association's Rules of Professional Responsibility, particularly Rule 1.6, Mr. Willson agreed with the military judge's proposition that his (Willson's) trial tactics would be in accordance with the client's wishes in those areas where the client had the ultimate decision. Furthermore, he agreed that if his client wanted a forum other than that forum which appeared at trial, Mr. Willson would challenge it. Finally, he acknowledged that the October 21 fax, although it did not bear his signature, reflected appellant's selection of a forum consisting of enlisted members, and that he neither challenged the array or any individual enlisted member for cause.

The military judge at the *DuBay* hearing ordered by the court below found that appellant made an informed, personal choice of forum in this case. He made the following pertinent findings of fact:

> Three, at the Article 39(a) session, the military judge advised Sergeant First Class Morgan of his forum choices. He was advised that he could be tried by a panel comprised of officers, or at his choice, a panel composed of officers and enlisted members; or at his request, by a judge alone. He was also advised how each forum would work;
>
> Four, Sergeant First Class Morgan understood his forum choices;
>
> Five, the court granted the defense request to defer forum notification, but directed that the defense notify

> the court of Sergeant First Class Morgan's choice of forum not later than the close of business on the 21st of October 1996;
>
> Six, Captain Roose of the defense provided written notice to the court that Sergeant First Class Morgan would request to be tried before a court-martial consisting of a panel comprised of at least one-third enlisted members;
>
> Seven, prior to providing this notice to the court, Captain Roose discussed forum choices with Sergeant First Class Morgan, and Sergeant First Class Morgan personally chose to be tried by a court consisting of at least one-third enlisted members.

The court below, relying on the facts derived from the *DuBay* hearing, concluded that there had been substantial compliance with Article 25, *supra*. It said:

> As in *Townes*, the military judge in this case failed to obtain on the record the appellant's personal election of trial with enlisted members. Four officers and five noncommissioned officers were empaneled in the presence of the appellant to hear the case. After one officer was excused, the remaining three officers and five enlisted members heard this fully contested case, including the appellant's testimony. At no time during the trial did the appellant object to trial with enlisted members. Moreover, the appellant did not object to the composition of his court-martial in either his post-trial submissions or his initial appellate pleadings. There was no allegation that the appellant lacked the competence to make a knowing and intelligent election or that he was coerced.

Unpub. op. at 6. We agree.

DISCUSSION

Prior to 1983, Article 16(1)(B), UCMJ, 10 USC § 816(1)(B), provided that requests for a trial judge alone be made "in writing." Likewise, Article 25(c)(1), *supra*, provided that a request for an enlisted panel be made personally "in writing."

In *United States v. Dean*, 20 USCMA 212, 43 CMR 52 (1970), the Court held that a request for trial by judge alone which was not made in writing was a jurisdictional defect. In response, Congress amended Article 16 to provide that a request for trial by judge alone may be made either "in writing" or, for the first time, orally on the record. Military Justice Act of 1983, Pub. L. No. 98-209, § 3(a), 97 Stat. 1393, 1394. No change was made to the requirement in Article 25(c)(1) that the accused's personally request in writing that enlisted members be appointed to the court-martial. Since that change was not made, this Court held in *United States v. Brandt*, 20 MJ 74 (CMA 1985), that the failure to personally request in writing a trial by a panel composed of enlisted members created a jurisdictional defect. However, in 1986, Congress amended Article 25 to parallel the change it made earlier to Article 16 – a request that at least one-third of the panel be composed of enlisted members may be made "personally ... orally on the record or in writing...." National Defense Authorization Act for Fiscal Year 1987, Pub. L. No. 99-661, § 803(a), 100 Stat. 3816, 3906.

As in *United States v. Townes*, 52 MJ 275 (2000), and *United States v. Turner*, 47 MJ 348 (1997), the record establishes that the selection of an enlisted forum was appellant's choice. There were many opportunities to voice an objection to having enlisted members on the panel, and none was made. The failure to get appellant's request on the record

was a procedural error, not a jurisdictional defect. *See United States v. Mayfield*, 45 MJ 76, 178 (1996).

The decision of the United States Army Court of Criminal Appeals is affirmed.

SULLIVAN, Senior Judge (dissenting in part and concurring in the result):

I do not think there was any error by the trial judge in this case. *See United States v. Van Doren*, 182 F.3d 1077, 1080 (9th Cir. 1999) (holding that district court's colloquy with defendant under Fed. R. Crim. P. 11 does not need to be word-for-word from a set script). He explained to appellant his right to enlisted members and was assured on the record that appellant understood this right. (R.6-7) He also asked the defense to indicate its forum selection, but defense counsel deferred. (R.7) Furthermore, he required defense counsel to notify the Government of its forum selection in writing at a later date. (R.68-69) Thus, it was defense counsel who failed to reopen the previously deferred matter with the trial judge on the record. (R.90-91)

In any event, the record as a whole and common sense show substantial compliance with Article 25, Uniform Code of Military Justice, 10 USC § 825, and its requirement that appellant personally request that enlisted members serve on his military jury. *See United States v. Townes*, 52 MJ 275, 277 (2000)(Sullivan, J., concurring in the result); *see also United States v. Turner*, 47 MJ 348, 351 (1997)(Sullivan, J., concurring in the result); *United States v. Mayfield*, 45 MJ 176, 178 (1996) (Sullivan, J., concurring); *United States v. Yates*, 28 MJ 60 (CMA 1989); *United States v. Jette*, 25 MJ 16 (CMA 1987); *see also United States v. King*, 28 MJ 397, 399 (CMA 1989).

The following facts in the record amply support the conclusion that there was substantial compliance with Article 25:

1. Appellant was told by the judge about his right under Article 25 to have one-third of his military jury composed of enlisted members.(R.6-7)

2. Appellant, acting through counsel, elected in writing to have a military jury with enlisted members. (Appellate Exhibit XXXVIII)

3. Appellant was furnished a military jury with enlisted members. (court-martial convening order and R.95-96)

4. In appellant's presence, his civilian defense counsel (a retired JAG Officer and former prosecutor at Fort Sill) participated in the *voir dire* of the military jury. (R.119)

5. There was no complaint about an Article 25 violation in the clemency materials.

6. In the *DuBay*[*] hearing after the trial, the military judge found that appellant personally chose to be tried by a court consisting of at least one-third enlisted members. (*DuBay* hearing record at 82)

Under these factual circumstances, I hold that there was substantial compliance with the statutory requirement for a personal request for a military jury with enlisted members. *See Brown v. Burns*, 996 F. 2d 219, 220-21 (9th Cir. 1993) (holding analogous rules intended to provide best record evidence of a defendant's express consent). Appellant's conviction for the wrongful importation and possession of 47.38 pounds of marijuana should *not* be reversed due to his technical attack on the jury's verdict. "Fairness and common sense, not technicalities, should rule the law." *United States v. Townes*, *supra* at 277. Accordingly, I vote to affirm.

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[*] 17 USCMA 147, 37 CMR 411 (1967).

EFFRON, Judge (dissenting):

The majority opinion concludes that a document entitled "Notice of Plea and of Forum" submitted prior to trial and signed solely by defense counsel substantially complies with the requirement of Article 25(c)(1), Uniform Code of Military Justice (UCMJ), 10 USC § 825(c)(1), that the accused "personally" request "orally on the record or in writing" that enlisted members serve on the court-martial panel. The opinion is contrary to the express statutory requirement established by Congress, the purposes of the legislation, and the prior case law of this Court. I respectfully dissent.

A convening authority has broad power to detail commissioned and warrant officers to serve on courts-martial. *See* Art. 25(a) and (b). Congress, however, has sharply limited the authority to assign enlisted personnel to courts-martial. The present case involves the statutory restriction providing that an enlisted member may serve on a court-martial "*only* if, *before* the conclusion of a session called by the military judge . . . *prior to trial* or, in the absence of such a session, *before the court is assembled*..., the accused personally has requested *orally on the record or in writing* that enlisted members serve on it." Art. 25(c)(1) (*emphasis added*). In the present case, the record of the pretrial sessions and the other proceedings prior to assembly of the court is clear. No such request was made on the record by appellant or by counsel on his behalf.

I. ENLISTED PARTICIPATION ON COURT-MARTIAL PANELS - HISTORICAL DEVELOPMENT OF THE CHOICES AVAILABLE TO THE ACCUSED

The detailed review of the language, history, and purposes of Article 25(c) by our Court in *United States v. White*, 21 USCMA 583, 45 CMR 357 (1972), underscores the importance of the rights at stake in this case. The UCMJ not only gives a

servicemember the right to be tried by a panel with enlisted membership, it also gives the member the equally important right to be tried by a panel that does not include enlisted members.

From colonial times through World War II, courts-martial were composed only of officers. *See id.* at 584-85, 45 CMR at 358-59. Following widespread dissatisfaction with the administration of military justice during the Second World War, Congress considered a variety of studies and proposals for change, including change in the composition of courts-martial. See id.; S. Rep. No. 81-486, at 3-4 (1949).

In 1947, the Secretary of War forwarded to Congress legislation which included a provision authorizing the detail of enlisted persons to serve on courts-martial "when deemed proper by the appointing authority." *See* 21 USCMA at 585, 45 CMR at 359, quoting *Hearings on H.R. 2575 to Amend the Articles of War Before a Subcomm. of the House Comm. on Armed Services*, 80th Cong. 1904 (1947). A competing bill was introduced by Rep. Carol Durham, who had chaired one of the post-War military justice investigations, which included an amendment providing an accused with the "right to demand that enlisted personnel sit on the court." *See* 21 USCMA at 585, 45 CMR at 359, quoting *1947 House Hearings*, *supra* at 2163. During the hearings, Congress received testimony emphasizing that there were mixed views on whether it would be beneficial, from the perspective of the accused, for enlisted persons to sit on courts-martial. The primary concern was that an accused might not want to be tried before a panel with enlisted court members on the ground that the enlisted members selected by the appointing authority "would be inclined to be considerably harsher than officer court members." 21 USCMA at 586, 45 CMR at 360.

At the conclusion of the hearings, the Committee recommended an amendment to the Articles of War authorizing enlisted personnel to sit on courts-martial "when requested in writing by the accused at any time prior to the convening of the court." *See* 21 USCMA at 587, 45 CMR at 361 (quoting H.R. Rep. No. 80-1034, at 1 (1947)). Reflecting the likely skepticism by an accused about the desirability of being tried before a panel including senior enlisted members, the Committee Report added: "We seriously doubt that the inclusion of enlisted men as members of the court will benefit enlisted men who are defendants, however, the choice is properly a right of the defendant. Once having exercised that right he must assume the responsibility for the results of his choice." *Id.* (quoting H.R. Rep. No. 80-1034, at 6).

In 1948, the amendment was included in the statute commonly known as the Elston Act, the comprehensive revision of the Articles of War, which served as the precursor to the UCMJ. Act of June 24, 1948, ch. 625, tit. II, § 203, 62 Stat. 604, 628. As our Court observed in *White*, Congress further underscored the right of the accused to make a choice when, in applying this provision to all the services, the legislation added that the request for enlisted members must be made "personally" by the accused. 21 USCMA at 588, 45 CMR at 362 (quoting Article 25).

In *White*, our Court concluded that because "an accused cannot be compelled to be tried by a panel with enlisted members," the failure to obtain the requisite written request prior to trial deprived the court-martial of jurisdiction -- even when there was an oral request by counsel on the record. 21 USCMA at 588-89, 45 CMR at 362-63 (citing *McClaughry v. Deming*, 186 U.S. 49 (1902)). *White* emphasized that the requirement of Article 25 was that "an accused 'personally makes that choice and does the signing personally and doesn't delegate it to anyone else—counsel or otherwise.'" Id. at 587,

45 CMR at 361 (quoting *Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong. 1147 (1949)). *White* also relied on *United States v. Dean*, 20 USCMA 212, 43 CMR 52 (1970), which found jurisdictional error in failure to comply with the parallel language requiring a written request for a trial by judge alone before the court is assembled. *See* Art. 16, UCMJ, 10 USC § 816.

In 1983, Congress amended Article 16 to permit a request for trial by judge alone "orally on the record or in writing" before assembly of the court. Congress, however, did not make a parallel change in Article 25(c)(1) with respect to the choice of a court composed of enlisted members. Military Justice Act of 1983, Pub. L. No. 98-209, § 3(a), 97 Stat. 1393, 1394; *see also United States v. Brandt*, 20 MJ 74, 77 (CMA 1985). Absent a parallel change in Article 25(c)(1), our Court declined to permit an oral request for enlisted members -- emphasizing that any such change "is for Congress and not for this Court." *Brandt, supra.*

In light of our suggestion, Congress subsequently amended Article 25(c)(1) to permit an oral request for enlisted members. Even so, Congress left the remainder of the statute unchanged -- particularly the requirement for a personal choice by the accused prior to assembly. National Defense Authorization Act for Fiscal Year 1987, Pub. L. No. 99-661, § 803(a), 100 Stat. 3816, 3906.

II. DEFICIENCIES ON THE RECORD

In *United States v. Turner*, 47 MJ 348 (1997) (trial by judge alone), and *United States v. Townes*, 52 MJ 275 (2000), we considered whether an oral request by counsel would constitute substantial compliance with the requirement that the accused make a personal choice of forum "orally on the record" under Articles 16 and 25(c)(1), respectively. Each case involved an accused who received an explanation of his rights

on the record, and whose counsel made an oral request on the record in the courtroom in the presence of the accused. *See* 47 MJ at 350; 52 MJ at 276. Under those circumstances, and in the absence of anything contradictory in the record, we held that there was substantial compliance with the statutory requirements. 47 MJ at 350; 52 MJ at 277.

The present case is different. The record of the proceedings prior to assembly contains no request for trial by enlisted members by appellant, nor did counsel make such a request on appellant's behalf in appellant's presence. The Court of Criminal Appeals recognized this deficiency, but erred by relying on a post-trial *DuBay*[*] hearing to remedy the defective trial proceedings. The record as to the accused's choice of forum must be made at trial, orally and on the record, *Townes*, *supra* at 277; or in the case of a written election, it must be signed by the accused personally, not by counsel. *White*, *supra*.

A jurisdictional deficiency cannot be corrected through a post-trial reconstruction of events in a *DuBay* hearing. *See United States v. Irvin*, 21 MJ 184, 187 (CMA 1986). A post-trial attempt to reconstruct conversations between counsel and client is no substitute for the statutory requirement of a request on the record. Likewise, the record cannot be cured through reliance on a unilateral pretrial fax from defense counsel describing what his client "will request" -- a document which on its face describes only a possible future action, not a present request.

Congress has determined that the Sixth Amendment right to trial by jury should not apply to members of the armed forces tried by courts-martial, and that servicemembers may be tried by courts-martial composed of members personally selected by the commander who has exercised prosecutorial discretion to

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[*] 17 USCMA 147, 37 CMR 411 (1967).

send the case to trial. In that context, it is particularly important to ensure compliance with the limited rights that Congress has provided servicemembers with respect to selection of forum.

In Article 25(c)(1), Congress emphasized the importance of demonstrating that the accused made a clear choice on the record, prior to trial, showing the personal selection by the accused with respect to enlisted members. Article 25(c)(1) reflects congressional recognition that servicemembers not only have the right to a panel including enlisted members, but also the right to a panel excluding enlisted members. The record of trial in the present case is devoid of an affirmative request prior to assembly by appellant, or by counsel acting on his behalf and with his knowledge and approval, for participation by enlisted members. Under these circumstances, the record does not demonstrate substantial compliance with Article 25(c)(1), and appellant's conviction should be reversed.

APPENDIX B

UNITED STATES,
Appellee

V.

Sergeant First Class DANIEL E. MORGAN
United States Army,
Appellant

ARMY 9601890

UNITED STATES ARMY
COURT OF CRIMINAL APPEALS

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14 May 2001

Before CAIRNS, MERCK, and VOWELL Appellate Military Judges

MEMORANDUM OPINION

CAIRNS, Senior Judge:

A general court-martial composed of officer and enlisted members convicted the appellant, contrary to his pleas, of importing 47.38 pounds of marijuana into the customs territory of the United States, in violation of Article 112a, Uniform Code of Military Justice, 10 U.S.C. § 912a,[hereinafter UCMJ]. The convening authority approved the sentence consisting of a dishonorable discharge, confinement for six years, forfeiture of $437.00 pay per month for six years, and reduction to Private E1. The convening authority deferred the forfeitures of pay for two months and ten days and ordered 92 days of credit against the sentence to confinement.

In this Article 66, UCMJ, appeal, we have examined the record of trial and considered the parties' briefs. We specified two issues and heard oral argument on whether the appellant personally requested enlisted members, as required by Article 25(c), UCMJ.[1] Following oral argument, we ordered a limited hearing pursuant to *United States v. DuBay*[2] to find facts pertinent to the appellant's election of forum at his court-martial. The military judge at the *DuBay* hearing heard the evidence and found that the appellant made an informed, personal choice to be tried by a court consisting of officer and enlisted members.

The appellant assigns four errors: (1) that the military judge erred by failing to recuse himself from presiding at the *DuBay* hearing because it was the military judge's own error at trial that precipitated the *DuBay* hearing; (2) that this court cannot consider disclosures made at the *DuBay* hearing by the appellant's military and civilian trial defense counsel because the military judge erroneously ordered them to violate the attorney-client privilege; (3) that the record fails to demonstrate that the appellant made a personal election of forum; and (4) that the military judge abused his discretion when he denied the appellant's motion at trial for discovery of certain evidence. After careful review of the record, we reject the assignments of error, as well as the matters personally submitted by the appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

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[1] Subsequent to oral argument, and during the delay required for further fact-finding proceedings, Judge Kaplan retired and has not participated further in this case. Judge Vowell replaced Judge Kaplan on this case.

[2] 17 U.S.C.M.A. 147, 37 C.M.R. 411 (1967).

Recusal

"[A] military judge shall disqualify himself or herself in any proceeding in which the military judge's impartiality might reasonably be questioned." Rule for Courts-Martial 902(a) [hereinafter R.C.M.]. "While military judges are obligated to disqualify themselves when they lack impartiality, they are equally obligated not to disqualify themselves when there is no reasonable basis for doing so." *United States v. Burton*, 52 M.J. 223, 226 (2000)(citation omitted); *see also* R.C.M. 902(d)(1) discussion ("The military judge should broadly construe grounds for challenge but should not step down from a case unnecessarily."). "[I]n the absence of any 'evidence that the military judge forfeited his judicial mantle of impartiality that would necessitate a disqualification,' a judge is not barred from judicially reviewing and ruling upon the correctness of a prior judicial ruling made by himself." *United States v. Campos*, 42 M.J. 253, 262-63 (1995)(quoting *United States v. Sanchez*, 37 M.J. 426, 428 (C.M.A. 1993)).

Failure to object may waive the issue of an R.C.M. 902(a) disqualification, particularly when such failure deprives appellate courts with a record that would have been developed in the course of litigating the objection or challenge. *See United States v. Howard*, 50 M.J. 469, 470 (1999). Moreover, "[f]ailure of the defense to challenge the impartiality of a military judge may permit an inference that the defense believed the military judge remained impartial." *Burton*, 52 M.J. at 226 (citing *United States v. Hill*, 45 M.J. 245, 249 (1996)).

"When a military judge's impartiality is challenged on appeal, the test if 'whether "taken as a whole in the context of this trial," a court-martial's "legality, fairness, and impartiality" were put into doubt by the military judge's [conduct].'" *Burton*, 52 M.J. at 226 (citations omitted). We

review a military judge's sua sponte duty to recuse himself under an abuse of discretion standard. Id.

At the appellant's trial, the military judge failed on the record to obtain from the appellant a personally-articulated oral request for enlisted members or a written request personally signed by the appellant. The same military judge who presided at trial also presided at the *DuBay* hearing. After the military judge announced at the *DuBay* hearing that he had not acted in any manner inconsistent with his judicial duties, the trial defense counsel neither requested to voir dire the military judge nor objected to his presiding at the hearing. The *DuBay* record reveals that the appellant's trial defense counsel coordinated with the appellant's appellate defense counsel and continued to discuss the issues during an overnight recess of the *DuBay* proceedings, and yet the trial defense counsel asserted no challenge against the military judge. We hold, under the circumstances of this case, that the appellant waived the issue of whether the military judge's impartiality might have been reasonably questioned.

Assuming, arguendo, that the issue was not waived, there is simply no evidence that the military judge forfeited his judicial mantle of impartiality at the DuBay hearing. In asserting that the military judge had a duty to recuse himself, sua sponte, under R.C.M. 902(a), the appellate defense counsel focuses on the fact that the military judge at the *DuBay* hearing was the same military judge who presided at trial, implying that a military judge is per se disqualified to gather facts relevant to alleged errors committed at a trial

over which he or she previously presided.[3] We find this argument unpersuasive.

Military judges decide difficult and vigorously disputed issues every day without losing their impartiality. That is the professional nature of judicial decision making. Military judges who have previous involvement with cases do not, per se, forfeit their ability to perform their judicial duties impartially, nor should such involvement affect informed observers' perceptions of judicial impartiality. For example, when considering motions to suppress confessions, seized evidence, or uncharged misconduct, "[m]ilitary and civilian judges are routinely tasked with hearing [incriminating] facts for limited purposes, which they later disregard if consideration would be improper. . . . Judges need not recuse themselves under these circumstances." *Howard*, 50 M.J. at 471. We perceive no reason to treat *DuBay* fact finding regarding an earlier trial error any differently.

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[3] The appellant's argument is based primarily on the fact that the military judge was the same judge whose omission at trial created the issue. The appellate defense counsel baldly asserts that the purpose of the DuBay hearing was to "correct" the military judge's mistake; that "[t]he military judge placed himself in a position to ensure that his omission would not result in the vacation of appellant's court-martial"; and that "a reasonable person . . . would believe that [the military judge] had a vested interest in preserving appellant's conviction." We categorically reject these assertions of improper judicial motive as unsupported by the record and as an unfair attack on the judicial integrity of the military judge. We acknowledge that the appellate defense counsel cites the fact that the military judge ordered the trial defense counsel to provide information that they regarded as protected by the attorney-client privilege as evidence of the military judge's lack of impartiality. However, the appellate brief lapses into the pejorative by charging that the military judge "was determined to preserve appellant's court-martial at all costs, including the loss of an attorney's license to practice law." In this regard, the record is clear that the military judge was applying a principled (and in our view, correct) view of the law when he compelled the trial defense counsel to disclose their client's forum selection.

We infer from the trial defense counsel's failure to object to or challenge the military judge at the *DuBay* hearing that he believed the military judge maintained his impartiality. Likewise, we hold that a reasonable person, with knowledge of the circumstances of this case, would not have a substantial doubt about the military judge's impartiality. *Burton*, 52 M.J. at 226 (citation omitted). Accordingly, the legality, fairness, and impartiality of the court-martial were not put in doubt. *Id.*

Disclosure of Appellant's Forum Election

At the *DuBay* hearing, the trial defense counsel who represented the appellant at the hearing, and the military and civilian defense counsel who represented the appellant at trial, attempted to prevent disclosure of the appellant's court-martial forum election by asserting that the appellant's communication to his counsel regarding his forum choice were protected by the attorney-client privilege. The military judge rejected the applicability of this privilege under the circumstances and ordered the military trial defense counsel to answer his questions regarding the appellant's forum choice. As a consequence, the military trial defense counsel revealed that the appellant "chose to go with the enlisted panel" and that a written Notice of Plea and of Forum, signed only by the military defense counsel, meant that the appellant wanted a court-martial consisting of at least one-third enlisted members.

The appellant contends that his pretrial communication to counsel that he desired to be tried by a court consisting of at least one-third enlisted members was protected by the attorney-client privilege, as set forth in Military Rule of Evidence 502 [hereinafter Mil. R. Evid.]. Furthermore, he asserts that the military judge erred by ordering disclosure of his forum decision at the *DuBay* hearing. We disagree.

Under Mil. R. Evid. 502(a), "[a] client has a privilege to refuse to disclose and to prevent any other person from disclosing *confidential communications* made for the purpose of facilitating the rendition of professional legal services to the client." (Emphasis added). "A communication is 'confidential' if not intended to be disclosed to third persons . . . ." Mil. R. Evid. 502 (b)(4). The party asserting the privilege has the burden to demonstrate that the attorney-client relationship exists and that the communication falls within the privilege. Whether a communication is confidential and the attorney-client privilege applies are factual issues that we review for clear error. *See United States v. Nelson*, 38 M.J. 710, 716 (A.C.M.R. 1993)(citation omitted); *Sheet Metal Workers Int'l Ass'n. v. Sweeney*, 29 F.3d 120, 123 (4th Cir. 1994)(citing *United States v. Tedder*, 801 F.2d 1437, 1442 (4th Cir. 1986)).

The military judge did not err when he determined that the appellant's pretrial communication to his attorneys of his forum decision was not a confidential communication as defend by Mil. R. Evid. 502(b)(4). The record is clear that both the military judge and trial defense counsel advised the appellant of his forum rights. Thus, the appellant knew that his forum decision would not be held in confidence but would be revealed in open court to the military judge. As his statement to his attorneys was intended to be disclosed to others, the attorney-client privilege never attached because the statement was not "confidential." *United States v. Romano*, 46 M.J. 269, 273 (1997)("Statements intended to be communicated to third parties are not confidential."); *United States v. Hubbard*, 16 F.3d 694, 697 n.3 (6th Cir. 1994)(information provided in an appellant's answer to a complaint in bankruptcy was not protected by the attorney-client privilege because what the appellant communicated to his attorney "was to be conveyed to the bankruptcy trustee

and the court via written pleading and thus was not protected by the privilege: the privilege extends only to *confidential* communications, and not all communications" (emphasis in original)), *rev'd in part on other grounds, Hubbard v. United States*, 514 U.S. 695 (1995). Accordingly, the appellant's pretrial communications to his attorneys of his decision regarding forum was not protected by the attorney-client privilege.

Article 25(c), UCMJ, Violation

The facts of this case are similar to those in *United States v. Townes*, 52 M.J. 275 (2000), *cert. denied, Townes v. United States*, 121 S. Ct. 62 (2000), in which the Court of Appeals for the Armed Forces held that there had been substantial compliance with the requirements of Article 25(c), UCMJ. As in *Townes*, the military judge in this case fully advised the appellant of his forum rights at the initial Article 39(a), UCMJ, session. The appellant stated that he understood those rights. At the request of the trial defense counsel, the military judge granted the appellant's request to defer his choice of forum. The military judge set specific dates by which the appellant's forum election and notice of motions were to be submitted to the government. Between the initial Article 39(a), UCMJ, session and the trial date, the military trial defense counsel signed and submitted to the military judge a written Notice of Plea and of Forum which stated: "The defense will request trial before a court-martial panel consisting of at least one third enlisted members. The defense will promptly notify should these choices change prior to trial."

As in *Townes*, the military judge in this case failed to obtain on the record the appellant's personal election of trial with enlisted members. Four officers and five noncommissioned officers were empaneled in the presence of the appellant to hear the case. After one officer was

excused, the remaining three officers and five enlisted members heard this fully contested case, including the appellant's testimony. At no time during the trial did the appellant object to trial with enlisted members. Moreover, the appellant did not object to the composition of his court-martial in either his post-trial submissions or his initial appellate pleadings. There was no allegation that the appellant lacked the competence to make a knowing and intelligent election or that he was coerced.

At the *DuBay* hearing, the appellant testified that he did not remember whether he selected enlisted members, but he remembered that the military judge advised him of his forum rights; that enlisted members sat as part of the court-martial panel; and that he did not object to the court composed of at least one-third enlisted members. He also confirmed that, at the time of trial, he was a Sergeant First Class with twenty-one years of service, had a General Technical (GT) score of 125, and had two years of college credit.

Also at the *DuBay* hearing, the appellant's trial defense counsel testified that the appellant had selected trial with enlisted members. She confirmed that his selection was reflected on the written notice she signed and submitted prior to trial.

After receiving evidence at the *DuBay* hearing, the military judge entered findings of fact. Based on the facts, the military judge concluded that the appellant made an informed personal choice to be tried by a court composed of at least one-third enlisted members. We review a military judge's findings of fact under a clearly-erroneous standard and his conclusions of law de novo. *See generally United States v. Ayers*, 54 M.J. 85, 95 (2000).

The military judge's findings of fact are supported by the evidence, and we adopt them as our own. We hold, after reviewing the issue de novo, that the military judge erred by

not obtaining on the record the appellant's personally-articulated oral request for enlisted members or a written request for enlisted members signed personally by the appellant, in violation of Article 25(c), UCMJ. However, just as our superior court concluded in *Townes*, we conclude that the error was not jurisdictional "because there is sufficient indication by [the appellant] orally and on the record that he personally requested enlisted members." *Townes*, 52 M.J. at 277. Considering the entire record, including the *DuBay* proceedings, we find as fact that the appellant personally elected to be tried by a court composed of at least one-third enlisted members. As our superior court held in *Townes*, we hold that there was substantial compliance with Article 25(c), UCMJ, in this case and that the military judge's procedural error did not materially prejudice the substantial rights of the appellants.

Discovery

At a pretrial Article 39(a), UCMJ, session, the defense moved for the appointment of an independent defense investigator to assist the defense team in a number of general areas of interest, including identifying and interviewing prospective witnesses. After reviewing briefs and hearing oral argument on this issue, the military judge properly denied the motion in accordance with the principles set forth in *United States v. Garries*, 22 M.J. 288 (C.M.A. 1986)(the defense must demonstrate necessity for the appointment of an independent defense expert).[4] As part of his ruling, the

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[4] The military judge held that the defense had only made a generalized request, "hoping to find some evidence that [would] help its case"; that the defense had failed to demonstrate the necessity for an investigator, any specific evidence, or specific witnesses; that the defense had failed to define the relevance of the information sought; and that the defense had not made a realistic showing that the investigator was needed to provide assistance that the defense could not otherwise provide themselves.

military judge also denied the defense access to any U.S. Customs drug investigative filed pertaining to Mr. Jesus Gonzales and to any other related investigations conducted by state and federal law enforcement agencies. He found that there had been an inadequate demonstration by the defense that the files even existed, that if they did exist, they were located in a particular place, and that they contained information relevant to the case. The appellant asserts that the military judge abused his discretion in denying the defense discovery of the records pertaining to Mr. Gonzales. We disagree.

First, we must note that the trial defense counsel's pretrial discovery motion did not specifically request the disclosure of files or records pertaining to Mr. Gonzales, although the motion for an investigator was broad enough to encompass their desire to locate and inspect any files pertaining to Mr. Gonzales or other potential accomplices or witnesses. Second, the military judge's ruling as to discovery of the files pertaining to Mr. Gonzales was gratuitous in the sense that the parties had essentially worked out an arrangement, satisfactory to both, that the only evidence that would be offered regarding Mr. Gonzales would involve the matters uncovered by the Criminal Investigation Command. Third, Mr. Gonzales was a tangential figure overall, and any additional discovery about him would not have changed the outcome of the trial. The defense's theory was that the appellant was an unwitting mule for others, to include Mr. Gonzales, whose name was on the title of the vehicle in which the appellant was transporting 47 pounds of marijuana. However, the appellant's own testimony rendered the defense's theory of innocent possession so improbably that nothing Mr. Gonzales might have added could have saved the appellant from conviction. The evidence was overwhelming that the

appellant knowingly and unlawfully imported the marijuana into the customs territory of the United States.

The military judge's ruling on this discovery issue was fully supported by the record. Without doubt, the defense failed to demonstrate how this evidence, if it existed would be necessary and helpful. Additionally, the record supports the military judge's conclusion that the defense failed to show that the evidence even existed. Although the trial counsel conceded that U.S. Customs was investigating Mr. Gonzales, it was within the context of the much broader, ongoing investigation into drug smuggling from Mexico. Nothing in the record indicates that a file existed on Mr. Gonzales, and certainly the government had not seen or possessed such a file. The record as a whole confirms that the defense was engaged in a generalized, pretrial investigation, and in attempting to obtain an independent investigator, they advanced speculative reasons to support their request. Part of this fishing expedition included obtaining information pertaining to Mr. Gonzales. Under these circumstances, we hold the military judge did not abuse his discretion in ruling adversely to the defense.

The findings of guilty and the sentence are affirmed.

Senior Judge MERCK and Judge VOWELL concur.